IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.509 OF 2006

State of Maharashtra
(At the instance of
Senior Inspector of
Police, D.C.B., C.I.D.,
Unit - VIII, Andheri (East)
Mumbai - 400 069 ...Applicant.
(Orig. Respondents)

V/s

Rahul @ Suresh Jamumal
Krishnani, aged about 29
years, Indian Inhabitant,
R/o. Radha Complex,
5th Floor, Dashara Ground,
Ulhasnagar - 3. ...Respondent
(Original accused No.2)

Mr. D.S. Mahispurkar with Ms. S.D. Shinde APP for the applicant - State.

Ms. Falguni J. Brahmabhatt for original complainant.

Mr. Bhojraj Jeswani for the respondent.

CORAM: V.M. KANADE, J.

DATE: 27th February, 2006

P.C.:

1. Heard the learned APP for the applicant - State and the learned Counsel for the respondent - accused No.2.

2. This is an application for cancellation of bail filed by the State. A complaint was filed against two accused vide C.R. No.588 of 2005 registered at Vile

Parle Police Station for the offence punishable under sections 328 and 342, 365, 376(1)(g), 323, 324 read with section 34 of the Indian Penal Code. It is alleged in the complaint that the complainant was a South African Citizen and she was invited by the owner of hotel by name Bawa International. It is alleged that the complainant had come to Mumbai as she had certain prospects of getting role in Hindi Films. After the complainant had a dinner with the owner of the hotel, she was told by him that they had a Pub in the ground floor where she could enjoy the hospitality of the hotel. It is alleged that, therefore, she went to the said Pub and had one glass of champagne and one glass of wine and after she had wine from the second glass, she went to toilet and after she came back she drank the wine and when she had left the table, she started feeling giddy and then she became unconscious. When she regained consciousness, she noticed that one person was forcibly committing rape on her and all her clothes were removed and after one accused committed rape, the other person who was sitting in the Car also committed rape and, thereafter, she was taken to the hotel where again the respondent - accused No.2 committed rape on her. It is stated that she was also assaulted by the accused. The application for bail was filed in the Sessions Court by the respondent -

accused and the Sessions Court was pleased to grant the bail. Against the said order, the present application has been filed by the State for cancellation of the bail.

3. It is contended by the learned APP appearing on behalf of the applicant - State that the Sessions Court had misread the statements of witnesses and had incorrectly held that the statements of all witnesses were contradictory. He submitted that the medical evidence including D.N.A. report clearly indicated that the respondent forcibly committed rape on the prosecutrix. The learned APP further submitted that the blood of the prosecutrix was found on the clothes of the respondent - accused No.2. He further submitted that the Medical Certificate indicated that there was redness on the thighs of the prosecutrix and that there were other injuries on her back. He invited my attention to the judgment of the Supreme Court wherein the Supreme Court had held that in cases where the Sessions Court had given incorrect reasons while releasing the accused on bail, the High Court was empowered to set aside that order and cancel the bail granted by the Sessions Court.

4. The learned Counsel appearing on behalf of respondent - accused No.2, on the other hand, submitted that the prosecutrix had, on her own, accompanied the respondent and that there was also evidence of other witnesses to indicate that she was in the company of other boys during the night. He submitted that the Sessions Court had taken into consideration all these aspects and had released the accused on bail. He submitted that the respondent had not misused the bail and the reasoning of the Sessions Court was not perverse. He submitted that, therefore, there was no reason for this Court to interfere with the order of bail granted by the Sessions Court.

5. I have given by anxious consideration to the submissions made by the learned APP appearing on behalf of the State and the learned Counsel for the respondent - accused No.2. It is no doubt true that the order passed by the Sessions Court is not very happily worded. Since the order is not happily worded, I have, with the assistance of the APP, gone through the statements of witnesses and I have also seen the documentary evidence on record. The evidence does indicate that the prosecutrix had consumed two glasses of champagne, one glass of red wine, two pegs of Sminorf, two pegs of Bakardi. The quantity of

alcohol which was consumed by the prosecutrix, thus, was sufficient even otherwise to intoxicate any person. The statements of waiters and the other persons also indicate that the prosecutrix had consumed alcohol and that accused had on various occasions tried to be friendly with the prosecutrix. The witnesses also have stated that the accused was a regular womaniser and, very often, used to be in the company of other women and at an occasion when he found that a woman was alone, he used to make advances to such woman. The other witnesses were security guards who were examined by the investigating authority. They have also stated that the respondent - accused used to bring women in the said flat on number of occasions.

6. Looking at the quantity of alcohol consumed by the prosecutrix, it is not possible to accept her case that sedatives were added to her wine at this stage particularly when no other chemicals were found in her blood. It is no doubt true that the learned APP has stated that her blood sample was taken after lapse of almost 2/3 days and, therefore, even otherwise, the possibility of finding any other chemical substance in her blood was remote. Even if that is one of the factor which belies her statement regarding sedatives

being given to her, other witnesses have also noticed that the prosecutrix was escorted by two accused to their car and since this has happened in the case of other girls, they did not find this unusual. The case of the prosecution therefore that the prosecutrix was drunk and, thereafter, she was taken to the Car and was raped does not appear to be correct in view of the statements of its own witnesses. It is no doubt true that there were certain scratches on her back and there was redness on the inner thighs of the prosecutrix but there were no injuries to her private parts. Though there were scratches on the back of the prosecutrix that by itself cannot indicate that there was sexual intercourse without the consent and, therefore, merely because there were scratches on the the back of the prosecutrix, it cannot be said that there was sexual intercourse without consent. The prosecutrix did not raise any hue and cry during the time she was taken to the hotel till the time she was dropped at her flat in Lokhandwala Complex at Andheri on the next day evening. The prosecutrix, therefore, had ample opportunity to escape from the clutches of the respondent - accused. As stated above, the order passed by the Sessions Court is not properly worded and the order does not give any indication regarding

the basis on which the Sessions Court comes to the conclusion that the respondent - accused No.2 was entitled to be released on bail. The Sessions Court merely mechanically refers to various aspects of the case and thereafter grants bail to the responded - accused No.2.

7. The law on the point of cancellation of bail by the High Court is quite well settled. The High Court can cancel the bail in cases where finding recorded by the Sessions Court is perverse or incorrect. In the present case, in my view, there is no reason to interfere with the order passed by the Sessions Court. The prosecutrix, as of today, is not in India. The investigation is over. There is no possibility of the respondent - accused No.2 tampering with the evidence. The prosecutrix has assured that she would come to India for the purpose of giving evidence. The fear of the prosecution that the respondent - accused No.2 would threaten the witnesses can be taken care of by imposing stringent conditions.

8. In the result, the application for cancellation of bail filed by the applicant - State is dismissed. The State to give protection to the prosecutrix when she comes to India for the purpose of giving evidence in

the present case. At that time, she may be kept in safe custody and should be given adequate police protection till the time she gives evidence in the court and, thereafter, leaves India and returns back home. If any attempt is made by the respondent - accused No.2 to tamper with the evidence or threaten the witnesses, the State shall have right to apply for cancellation of the bail and if any material is placed to show that the respondent - accused No.2 has made attempts to tamper with the evidence or threaten the witnesses, his bail is liable to be cancelled.

9. With the above directions the application is disposed of.

V.M. KANADE, J.